THE PROGRESS OF THE LAW, 1918–1919

CIVIL PROCEDURE

FORM AND SOURCES OF PROCEDURAL LAW

AT common law the adjective law, like the substantive law, developed mainly through judicial decisions reached by a process of judicial reasoning in which the judges arrived at their conclusions chiefly by the aid of ancient custom and the employment of deductive logic, professing at least not to make but to discover the law. The result, it must be admitted, was that common-law procedure was a complex system in which too often the courts lost sight of the true end and purpose of the adjective law — the determination and enforcement with reasonable speed of the substantive rights of the parties. Occasionally, from time to time, the legislature interfered, so that a certain amount of procedural law was to be found in statutes. In the middle of the last century the legislatures of many states attemped entirely to make over the adjective law by statute. Many reforms were effected, but the high hopes of the codifiers were not fulfilled; procedure, instead of being the servant of the substantive law, too often remained its master, a more rigid master than ever.[1] Following the lead of England, several states have now attempted to cure the evils of the existing systems by leaving to the courts the regulation of procedure by rules of court. From early times the judges possessed, and to a limited extent exercised, this power of consciously enacting adjective law;[2] but the rules adopted related for the most part to the *minutiae* of practice, and not to its broader principles. To-day in some jurisdictions, as in New Jersey,[3] there is a short Practice Act, and matters not covered by the Act are dealt with

[1] Mr. Root, at the meeting of the American Bar Association in 1919, said: "The legislatures are continually tying you up in threads, cords, ropes and chains of legislation about procedure. . . . One great trouble about the administration of law in the United States is that our legislative bodies will not permit the judges to do justice." 5 AMER. BAR ASS'N JOUR. 676, 677 (1919).

[2] In TIDD'S PRACTICE, a volume of great authority at the time of the American Revolution, will be found tables of rules of court reaching back to the time of Henry VI.

[3] NEW JERSEY LAWS, 1912, c. 231.

by rules of court; in Colorado[4] the courts are given power to prescribe rules of practice and procedure which shall supersede any statute in conflict therewith.[5]

During the last year a statute in South Dakota[6] has given the Supreme Court of that state power to enact rules of practice in civil and criminal actions governing the mode of trial and instructing juries.

In New York the Board of Statutory Consolidation has recently published its third report, recommending the enactment of a short Civil Practice Act containing forty-two brief sections, conferring upon a convention, composed of delegates chosen from the justices of the Supreme Court and the Appellate Division, and from members of the bar, the power to make rules regulating procedure in all matters not regulated by the Civil Practice Act. On the other hand, the Joint Legislative Committee on the Simplification of Civil Practice in New York has submitted an elaborate report in which, as a substitute for the proposal of the board, there has been suggested a reduced and amended code of some fifteen hundred sections. It appears that the plan of the committee offers few advantages over the existing Code of Civil Procedure, except in matters of detail and arrangement.

The American Judicature Society has recently completed a draft of a set of rules of civil procedure,[7] supplementary to the draft of a state-wide Judicature Act which it had previously published.[8] This draft, although as yet in a tentative form, is very suggestive.

At a meeting of the American Bar Association in 1910 the suggestion was made that the United States Supreme Court should be given power by rule of court to regulate procedure on the law side of the federal courts. A Committee on Uniform Judicial Procedure was created by the Association in 1912, and ever since

[4] COLO. LAWS, 1913, c. 121.

[5] The regulation of procedure by rules of court is advocated in the following articles: Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163 (1915); Hudson, "The Proposed Regulation of Missouri Procedure by Rules of Court," 17 U. MO. BULL. L. S. 13 (1916); Morgan, "Judicial Regulation of Court Procedure," 2 MINN. L. REV. 81 (1917). See also Mr. Root's remarks, 5 AMER. BAR ASS'N JOUR. 676 (1919).

[6] STAT. 1919, pages 150, 346.

[7] BULL. XIV (1919).

[8] BULL. VII A (1917).

that time the proposed change has been actively pressed by it. At length there is a near prospect of its adoption by Congress.[9] If the proposed bill is enacted and the rules promulgated by the Supreme Court work satisfactorily, it is not unlikely that a number of states will regulate their procedure on similar lines. This is one of the most important and most promising of proposed procedural reforms.[10]

Organization of the Courts

The courts have found it more and more difficult, as time has gone on, to dispose of the increasing mass of litigation with which they are confronted. Of late years the question of reorganizing the courts has been much mooted.[11] One of the evil effects of the prevailing rigid system of separate courts has been the waste of judicial power it entails; some courts have had little to do, while at the same time others are overwhelmed with business. An attempt has been made to stem the tide in some states by provisions giving more flexibility to the present system. In Oregon, for instance, a recent statute[12] confers upon the Chief Justice of the Supreme Court power to direct any circuit judge in the state to hold court in any county of any judicial district in the state. But in many states the remedy must be more sweeping, and a complete reorganization of the judiciary is necessary. Such a reorganization is advocated by the Bar Associations of Texas and Mississippi.[13]

Service of Process

In a few states statutes purport to give the courts jurisdiction over nonresidents not personally within the state but doing business therein, either as individuals or as partners, by service upon the manager or agent or person in charge of such business in the state.

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[9] See the report of the committee presented at the meeting of the American Bar Association in 1919, 5 Amer. Bar Ass'n Jour. 468.

[10] Thomas W. Sheldon, Esq., Chairman of the Committee on Uniform Judicial Procedure, has recently published a book entitled Spirit of the Courts, advocating the proposed reform.

[11] The matter has been taken up by the American Judicature Society. See Bull. IX (1915) and Bull. VII A (1917).

[12] Gen. Laws, 1919, c. 242.

[13] See Discussion of Proposed Amendment of Judiciary Articles of Constitution of Texas, 1918; Rep. Mississippi Bar Ass'n, 1918, page 101.

In the case of *Flexner* v. *Farson*[14] the Supreme Court of the United States held that a judgment rendered on such service is not entitled to full faith and credit in another state.[15] In that case the service was made upon a person who at the time of service had ceased to act as agent in charge of the business; and the decision can be supported on that ground. The court, however, seemed to base its decision upon the broader ground that a state cannot by statute confer upon its courts jurisdiction over nonresidents not personally present within the state and not expressly consenting to the jurisdiction of the courts of the state, although engaged in business within the state. It is submitted that this broad proposition is unsound. Although citizens of other states are, under the "privileges and immunities" clauses of the federal constitution, entitled to carry on business in any state, yet the state may regulate in a reasonable way the carrying on of such business. The Supreme Court of the United States has upheld a state statute providing that a nonresident owner of an automobile should, as a condition precedent to his right to operate it on the highways of the state, appoint the Secretary of State as his agent, upon whom process might be served in any action arising out of its operation within the state.[16] The same court has also held that a state statute providing that a corporation as a condition precedent to doing business within the state should appoint an agent or authorize a public official to accept service of process, applies even to corporations which seek to do within the state only interstate business.[17] It cannot be said, therefore, as is to be inferred from the opinion of the court in *Flexner* v. *Farson*, that the power of a state to require submission to the jurisdiction of the courts of the state is limited to cases where the state has power to exclude altogether. And it would seem, therefore, that a state may forbid a nonresident to do business within the state unless and until he has consented to the jurisdiction of the courts of the state as to

[14] 248 U. S. 289 (1919).

[15] Such a judgment was likewise held invalid in the recent case of Knox Bros. *v.* E. W. Wagner & Co., 209 S. W. (Tenn.) 638 (1919). And see Cabanne *v.* Graf, 87 Minn. 510, 92 N. W. 461 (1902), SCOTT, CASES ON CIVIL PROCEDURE, 24. On the other hand, the opposite result was reached in Victor Cornille & De Blonde *v.* R. G. Dun & Co., 79 So. (La.) 855 (1918).

[16] Kane *v.* New Jersey, 242 U. S. 160, 37 Sup. Ct. Rep. 30 (1916).

[17] International Harvester Co. *v.* Kentucky, 234 U. S. 579, 34 Sup. Ct. Rep. 944 (1914).

causes of action arising within the state out of the business there carried on. And if this is so, it may well be held that even in the absence of actual consent a nonresident subjects himself to the jurisdiction by doing business in a state in which there is such a statute.[18]

THEORY OF THE PLEADINGS

By the first section of the original New York Code of Procedure the distinction between actions at law and suits in equity, and the forms of those actions and suits, was abolished; and this provision was incorporated in the codes of other states. It was felt by David Dudley Field and his disciples that this marked a great step forward in the procedural law. Unfortunately, however, some courts have limited the operation of this provision. The idea that the plaintiff should recover if he states sufficient facts to constitute a cause of action, and proves those facts or enough of them to constitute a cause of action, has been defeated in New York and several other states by decisions to the effect that the plaintiff cannot recover except on the theory of law on which his complaint is founded.

In *Jackson* v. *Strong*[19] the plaintiff brought an action in New York alleging that he had entered into a contract with the defendant to prosecute an undertaking for their joint benefit, sharing equally as partners in the expenses and in the receipts, and he asked for an accounting and for recovery of the amount to be found due. The defendant denied the agreement to share, but alleged that he had agreed to employ the plaintiff as his assistant and to pay him the reasonable value of his services. The case was tried before a referee, who reported that there was no agreement to share, but found that the defendant had agreed to pay the plaintiff the reasonable value

[18] See Scott, "Jurisdiction over Nonresidents doing Business within a State," 32 HARV. L. REV. 871. Compare Beale, "Progress of the Law, 1918–1919 — Conflict of Laws," 33 HARV. L. REV. 1, 9.

As to what constitutes "doing business" within a state there have been as to corporations, many recent decisions. Gen. Inv. Co. *v.* Lake Shore, etc. Ry. Co., 250 Fed. (C. C. A. 6) 160 (1918); Golden Belknap & Swartz *v.* Connersville Wheel Co., 252 Fed. (D. C. E. D. Mich. S. D.) 904 (1918); Atchison, etc. Ry. Co. *v.* Weeks, 254 Fed. (C. C. A. 5) 513 (1918); Empire Fuel Co. *v.* Lyons, 257 Fed. (C. C. A. 6) 890 (1919); Vicksburg, etc. Ry. *v.* De Bow, 148 Ga. 738, 98 S. E. 381 (1919); Pembleton *v.* Illinois, etc. Ass'n, 124 N. E. (Ill.) 355 (1919). See also Peoples Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. Rep. 233 (1918); Kluver *v.* Middlewest Grain Co., 173 N. W. (N. D.) 468 (1919); Williams *v.* J. F. Ball, etc. Co., 182 Pac. (Kan.) 552 (1919).

[19] 222 N. Y. 149, 118 N. E. 512 (1917).

of his services, which he found to be something over $1,000. Judgment was given for the plaintiff for that sum. The Court of Appeals held that the judgment should be reversed, because in his complaint the plaintiff had proceeded on the theory of a partnership and his complaint was in the nature of a bill in equity, whereas the judgment was based upon a contract and was in the nature of a judgment at law.[20]

In Massachusetts, forms of action have not been entirely abolished, but have been reduced to three; *viz.*, tort, contract, and replevin. In *Ash* v. *Childs Dining Hall Co.*[21] the plaintiff brought an action of tort, alleging that the defendant corporation conducted a dining hall and that the plaintiff while eating a meal there as a customer was injured by swallowing a nail in a piece of pie, and that the defendant had negligently permitted the nail to get into the pie. The answer was a general denial. At the trial there was no evidence that the defendant was negligent. The judge refused to order a verdict for the defendant; and the Supreme Judicial Court held that this ruling was erroneous. It was conceded that if the plaintiff had sued on an implied warranty, she could have recovered; indeed it was so decided by the same court on the same day in a similar case,[22] in which the plaintiff, whose teeth had been injured by stones in a plate of beans served by the same defendant, sued in "tort or contract" on an implied warranty and recovered.[23] The mere fact, therefore, that the plaintiff in the Ash case made and failed to prove the unnecessary allegation of negligence, prevented his recovery, although he had alleged and proved enough facts to constitute a cause of action.[24]

How much simpler and more sensible is the practice in Ontario. In a recent address before the Judicial Section of the American Bar

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[20] For a criticism of the decision, see 31 HARV. L. REV. 166 (1918).

[21] 231 Mass. 86, 120 N. E. 396 (1918).

[22] Friend *v.* Childs Dining Hall Co., 231 Mass. 65, 120 N. E. 407 (1918).

[23] In Massachusetts the form of action to recover on an implied warranty may be tort or contract. See Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481 (1908).

[24] For recent decisions taking the same view on the general question of the theory of the pleadings, see Nave *v.* Dieckman, 208 S. W. (Mo. App.) 273 (1919); Deyo *v.* Hudson, 123 N. E. (N. Y.) 851 (1919). For cases taking the opposite view, see Knapp *v.* Walker, 73 Conn. 459, 47 Atl. 655 (1900), SCOTT, CASES, 103; Bruheim *v.* Stratton, 145 Wis. 271, 129 N. W. 1092 (1911), SCOTT, CASES, 105; Cockrell *v.* Henderson, 81 Kan. 335, 105 Pac. 443 (1909).

Association, Mr. Justice Riddell of the Supreme Court of Ontario, in speaking of civil practice in that province, said:

"Amendments of pleadings are allowed almost as of course at any stage even in the Appellate Division. Our rules in that regard are imperative not permissive — 'shall' not 'may.' . . .

"These amendments may be made in the proceedings before trial, they may be made at the trial, they may be made in the Appellate Division. Over and over again, in the Appellate Division in which I have the honor to sit, the objection has been taken, 'The judgment does not follow the pleadings,' and the answer made: 'Very well; we will amend the pleadings to agree with the facts.' There may be other facts which would require to be proved under the amended pleadings or other evidence which a party might desire to adduce. If so, we call the witnesses before us in the Appellate Division, and have them examined there; or sometimes facts are allowed to be proved on affidavit.

"If the facts are all before the court, we have little care for the pleadings and we care nothing for the 'state of the record.' . . . We care so little about the record that, in a great many cases, the amendments which are ordered to be made are not made in fact." [25]

Amendment of Pleadings

In *Friederichsen* v. *Renard* [26] the plaintiff brought suit in a federal court alleging fraud in an exchange of lands, and seeking cancellation of the contract and deeds. The defendants denied the fraud. A master reported that the plaintiff had been induced to enter into the contract by fraud, but that the plaintiff after having notice of the fraud had cut timber upon the land which he had received from the defendants under the contract. The court held that the plaintiff was not entitled to equitable relief, because by cutting the timber he had ratified the contract, and that his remedy was at law for damages; and it was ordered that the cause be transferred to the law side of the court and that the parties "file amended pleadings to conform with an action at law." [27] The plaintiff thereupon filed an amended petition on the law side of the court, stating the facts

[25] 5 Amer. Bar Ass'n Jour. 646, 647 (1919).

[26] 247 U. S. 207, 38 Sup. Ct. Rep. 450 (1918).

[27] This transfer was authorized under Federal Equity Rule 22. A transfer from the law side to the equity side of the federal courts is permissible under the provisions of the Law and Equity Bill of March 3, 1915, 38 Stat. at L. 956, amending Judiciary Code, § 274*a*.

which he had stated in the original bill in equity, and praying for a judgment for damages for deceit. The defendants pleaded the Statute of Limitations. At the time when the original bill was filed the period of limitations had not yet run, but it had run at the time when the amended petition was filed. A verdict was directed for the defendants and a judgment entered thereon, which was affirmed by the Circuit Court of Appeals. The case was carried to the Supreme Court of the United States on a writ of *certiorari*, and that court reversed the judgment, holding that the filing of the amended petition was not the commencement of a new action, and that the plaintiff was not barred by the Statute of Limitations. The decision seems sound;[28] the plaintiff was still relying on the same wrong, although the relief sought was different. The result of course could never have been reached at common law, where suits in equity and actions at law could not be entertained by the same court, nor in jurisdictions where it is impossible to transfer a case from the equity side to the law side of a court administering both law and equity.

There have been several other recent cases in which the question has arisen whether an amendment states a new cause of action which would be barred by the Statute of Limitations. In *Nash* v. *Minneapolis, etc. R. R. Co.*[29] the plaintiff brought suit in Minnesota for damages under the federal Employers' Liability Act for the death of her intestate in Iowa. After the period of limitations had expired she amended her complaint so as to base her action upon an Iowa statute. It was held that the Statute of Limitations was no bar.[30] The opposite result was reached in the converse case in *Carpenter* v. *Central Vermont Ry. Co.*,[31] where the plaintiff originally based his action upon the law of a state and amended his declaration so as to base his action upon the federal Employers' Liability Act.[32]

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[28] See Schurmeier *v.* Conn. Mut. Life Ins. Co., 171 Fed. (C. C. A.) 1 (1909), Smith *v.* Butler, 176 Mass. 38, 57 N. E. 322 (1900); Reynolds *v.* Mo., etc. Ry. Co., 228 Mass. 584, 117 N. E. 913 (1917).

[29] 169 N. W. (Minn.) 540 (1918).

[30] Baltimore & O. R. R. Co. *v.* Branson, 104 Atl. (Md.) 356 (1917), *contra*. See 3 MINN. L. REV. 132 (1919).

[31] 107 Atl. (Vt.) 569 (1919).

[32] In Breen *v.* Iowa Central Ry. Co., 168 N. W. (Iowa) 901 (1918), the court refused to allow the defendant after the statutory period to amend his answer or to introduce evidence to the effect that the defendant was engaged in interstate commerce. The

PLEADING — AIDER OF DEFECTS

If the plaintiff omits from his complaint a necessary allegation, and the defendant in his plea supplies the missing allegation, the defect in the declaration is cured.[33] In *Auxier* v. *Auxier*[34] it was held that a missing allegation in the plaintiff's complaint might be supplied in the plaintiff's reply. A decision to the same effect has been rendered in New Jersey.[35] These cases show a growing tendency toward requiring less formality in the pleadings, when the rights of the parties are not adversely affected thereby.[36] At common law it would appear that if the plaintiff has omitted an allegation in his declaration, it is not proper to supply it by inserting it in one of his subsequent pleadings, but he should amend his declaration.[37]

PLEADING — ALLEGATIONS IN THE ALTERNATIVE

In several states it is permissible for a party in his pleadings to allege facts disjunctively or in the alternative.[38] At common law such pleadings were regarded as uncertain and indefinite.[39] In *Macurder* v. *Lewiston Journal Co.*[40] it was held that a declaration in which the plaintiff alleged that the defendant published or caused to be published a certain libel was open to a general demurrer.[41]

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plaintiff therefore recovered without amending his complaint. See 3 MINN. L. REV. 59 (1918).

[33] Brooke *v.* Brooke, 1 Sid. 184 (1664), SCOTT, CASES, 192. Similarly, a plea may be aided by an admission in the replication. United States *v.* Morris, 10 Wheat. (U. S.) 246 (1825).

[34] 182 Ky. 588, 205 S. W. 684 (1918).

[35] Marine Trust Co. *v.* St. James A. M. E. Church, 85 N. J. L. 272, 88 Atl. 1075 (1913).

[36] It is not permissible for a plaintiff to supply a new cause of action in his reply; that would be a departure. Nor is it permissible to do so by filing a counterclaim to the defendant's answer. Smith *v.* Caster, 170 N. W. (S. D.) 156 (1918).

[37] Kearney County Bank *v.* Zimmerman, 5 Neb. (Unoff.) 556, 99 N. W. 524 (1904).

[38] Similarly also in some states parties may be named alternatively. See R. S. C. 1883 (England), Order XVI, Rules 1 and 4; CONN. PRACTICE BOOK, 1908, page 238; N. J. LAWS, 1912, p. 378, Rules 4 and 6. See Crouse *v.* Perth Amboy Pub. Co., 85 N. J. L. 476, 89 Atl. 1003 (1914); Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556, 45 Atl. 546 (1900). But see Casey Pure Milk Co. *v.* Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450 (1913), 51 L. R. A. (N. S.) 640, SCOTT, CASES, 154.

[39] STEPHEN, PLEADING, *426.

[40] 104 Me. 554, 72 Atl. 490 (1908), SCOTT, CASES, 203.

[41] King *v.* Brereton, 8 Mod. 330 (1725) (motion in arrest of judgment), *accord.* The

This was an extreme instance of the severity of the common-law rule. In *Adams Express Co.* v. *Heagy* [42] it was held that an allegation that the defendant knew, or by the exercise of reasonable care would have known, of a certain fact, was sufficient. Even where disjunctive allegations are regarded as uncertain, such allegations as those contained in the two cases above mentioned can hardly be so regarded. If one of the alternatives stated is insufficient to maintain the action, then of course no cause of action is stated and the pleading is demurrable.[43]

Trial by Jury

Trial by jury is becoming an increasingly expensive luxury. In many states the legislatures have, during the past year, increased the fees of jurors. In England the tremendous drain upon the man power of the country induced Parliament to pass a statute [44] whereby it was provided that during the continuance of the war, and for six months thereafter, issues in legal actions should be tried without a jury except in certain classes of actions, such as libel, slander, malicious prosecution, and the like, unless otherwise ordered by the court or a judge. The number of jurors required at coroners' inquests had been reduced by a statute of the previous year.[45]

Instructions to the Jury

In 1918 a bill was introduced in Congress providing that it should be reversible error for the judge presiding in a federal court to express his personal opinion as to the credibility of witnesses or the weight of testimony; and that the judge, where requested by either party, should reduce to writing his charge to the jury, and should deliver his charge before the argument of counsel, except when the court is sitting in states in which a trial judge is permitted to deliver his charge after argument of counsel. Fortunately this attempt to impair the power of the federal judges was unsuccessful;

better view is that the defect is open only to special demurrer or motion. See Anderson *v.* Minn., etc. Ry. Co., 103 Minn. 224, 114 N. W. 1123 (1908).

[42] 122 N. E. (Ind. App.) 603 (1919).

[43] Hoffman *v.* City of Maysville, 123 Ky. 707, 97 S. W. 360 (1906); Anderson *v.* Minn., etc. Ry. Co., 103 Minn. 224, 114 N. W. 1123 (1908), Hanford *v.* Duchastel, 87 N. J. L. 205, 93 Atl. 586 (1915).

[44] Juries Act, 1918, 8 & 9 Geo. V, c. 23.

[45] Coroners (Emergency Provisions) Act, 1917, 7 & 8 Geo. V, c. 19.

and although the bill was favorably reported by the Judiciary Committee of the House of Representatives, it was never brought to a vote in the House and was not introduced in the Senate.[46]

Motions for Directed Verdict

There have been several decisions during the past year reaffirming the rule prevailing in some states that if both parties move for a directed verdict, the case is taken from the jury and the determination of facts submitted to the court, whose decision will not be set aside unless a verdict by the jury to the same effect would be set aside.[47] It seems, however, that it is a strange perversion of the intention of the parties to turn a contention by each of them that there is no disputable question of fact, into a consent to allow the court to determine disputed facts. In some jurisdictions, accordingly, if there is a real dispute the court must deny both motions and submit the case to the jury.[48]

Judgment notwithstanding the Verdict

No trial by jury should be necessary when there is no disputable question of fact to be tried, and no new trial should be necessary when there is no disputable question of fact left undetermined. If on the evidence there is no room for dispute, a compulsory nonsuit may be ordered or a verdict directed by the trial judge. But if on such a state of evidence the judge refuses to grant a compulsory nonsuit or to direct a verdict, the only remedy thereafter in the trial court or in the appellate court at common law is the granting of a new trial.[49] It would seem unnecessary, however, to grant a new trial. The parties have had their day in court and there is no reason why they should be allowed another. In an increasing

[46] For a criticism of this bill, see 31 Harv. L. Rev. 1011.

[47] La Crosse Plow Co. *v.* Pagenstecher, 253 Fed. (C. C. A. 8) 46 (1918); Sampliner *v.* Motion Picture Patents Co., 259 Fed. (C. C. A. 2) 152 (1919); Hall *v.* Harrel, 206 S. W. (Ark.) 435 (1919); Bank of Benson *v.* Gordon, 172 N. W. (Neb.) 367 (1919); Rugh *v.* Soleim, 180 Pac. (Ore.) 930 (1919); Brush *v.* Rothschild, 174 N. Y. Supp. (App. Div.) 589 (1919). See Share *v.* Coats, 29 S. D. 603, 137 N. W. 402 (1912), Scott, Cases, 334. Before the rendition of the verdict either party may ask that the issues be submitted to the jury. Brown Paint Co. *v.* Reinhardt, 210 N. Y. 162, 104 N. E. 124 (1914). But *cf.* Sampliner *v.* Motion Picture Patents Co., 259 Fed. (C. C. A. 2) 152 (1919).

[48] Second Nat. Bank *v.* Smith, 91 N. J. L. 531, 103 Atl. 862 (1918).

[49] Wallace *v.* Oregon, etc. Co., 90 Ore. 31, 175 Pac. 445 (1918).

number of states,[50] as in England,[51] the trial court or the appellate court may order judgment to be entered notwithstanding the verdict. In the federal courts, unfortunately, it has been held, erroneously it is submitted, that the Seventh Amendment requires a new trial and that it is unconstitutional to order judgment to be entered notwithstanding the verdict.[52] In the case of *Banbury* v. *Bank of Montreal*,[53] recently decided by the House of Lords (Lord Finlay, L. C., and Lord Shaw dissenting), it was held that where the plaintiff failed to offer sufficient evidence to go to the jury but a verdict was rendered for the plaintiff, the Court of Appeal might order judgment to be entered for the plaintiff notwithstanding the verdict, although the defendant had failed at the trial to move for a directed verdict. Lord Atkinson in his opinion thus tersely stated the *ratio decidendi:*

"It seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found." [54]

This, it is submitted, is a sound principle.[55] The opposite result, however, was reached in New York in the case of *Ernst Zobel Co.* v. *Canals*.[56]

Of course, as all the judges in *Banbury* v. *Bank of Montreal* admitted, if by accident or mistake or because of surprise the plaintiff's failure to introduce evidence on some point was due to accident, mistake, or surprise, it would be proper to grant a new trial rather than to enter judgment for the defendant. It was so held in *Alink* v. *Chicago, etc. Ry. Co.*[57] Even though the court has power to give

[50] See Kiess *v.* Block & Kuhl Co., 205 Ill. App. 167 (1917); Cahn *v.* N. W. Mut. Life Ins. Co., 208 Ill. App. 317 (1917); Reynolds *v.* Searle, 186 App. Div. 202, 174 N. Y. Supp. 137 (1919); Anderson *v.* Phillips, 169 N. W. (N. D.) 315 (1918) *(semble);* Thress *v.* Zemple, 174 N. W. (N. D.) 185 (1919); Feeney *v.* Maryland Casualty Co., 107 Atl. (Pa.) 320 (1919); Searles *v.* Boorse, 107 Atl. (Pa.) 838 (1919). See also Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109, 84 N. W. 14 (1900), SCOTT, CASES, 489.

[51] Order 58, Rule 4. See Witherbotham & Co. *v.* Sibthorp, [1918] 1 K. B. 625.

[52] Slocum *v.* N. Y. Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. Rep. 523 (1913). Of course it is permissible to enter judgment on the pleadings notwithstanding the verdict.

[53] [1918] A. C. 626.

[54] Banbury *v.* Bank of Montreal, [1918] A. C. 626, page 675.

[55] See 32 HARV. L. REV. 711 (1919).

[56] 188 App. Div. 231, 176 N. Y. Supp. 537 (1919).

[57] 169 N. W. (Minn.) 250 (1918). See also Marshall *v.* Kansas City Rys. Co., 205 S. W. (Mo. App.) 971 (1918); Wallace *v.* Oregon, etc. Co., 90 Ore. 31, 175 Pac. 445 (1918).

judgment notwithstanding the verdict, it not infrequently happens that it is fairer to the parties, considering all the circumstances, to allow a new trial. In such a case, as was held in *Dubs* v. *Northern Pac. Ry. Co.*,[58] judgment will not be ordered but a new trial will be granted.

New Trial — Excessive and Inadequate Damages

In *Lisbon* v. *Lyman*[59] Chief Justice Doe of New Hampshire laid down "the general principle that when an error has happened in a trial, the party prejudiced by it has a right to the correction of the error, but has not a right to a new trial if the error can be otherwise corrected; and when it can be corrected only by a new trial, it is still the correction of the error, and not the new trial, to which he is primarily entitled." In accordance with this principle there are numerous decisions in this country to the effect that if the damages found by the jury are excessive, yet if the plaintiff is willing to remit the excess, the defendant cannot insist upon a new trial.[60] But this eminently reasonable principle was rejected by the House of Lords in *Watt* v. *Watt*.[61] In that case the plaintiff brought an action for libel and the jury found a verdict for him for £5,000; the Court of Appeal, on the ground that the damages awarded were excessive and unreasonable, made an order for a new trial unless the plaintiff should consent to a reduction of the damages to £1,500. The House of Lords reversed this order, and ordered a new trial without giving the plaintiff an option of remitting part of the damages. It was admitted that the order of the Court of Appeal was in accordance with an established practice; and Lord Davey admitted that the practice was convenient and that such an

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[58] 171 N. W. (N. D.) 888 (1919).

[59] 49 N. H. 553, 600 (1870).

[60] There have been many recent cases on this. See, for example, Union Pac. R. R. Co. *v.* Hadley, 246 U. S. 330, 38 Sup. Ct. Rep. 318 (1918); Rederiaktiebolaget Amie *v.* Universal Transp. Co., 250 Fed. (C. C. A. 2) 400 (1918), 38 Sup. Ct. Rep. 425 (1918) (*certiorari* denied); Louisville & N. R. R. Co. *v.* Frank, 80 So. (Fla.) 60 (1918); Todden *v.* Stephenson, 169 N. W. (Iowa) 34 (1918); Bothe *v.* True, 103 Kan. 562, 175 Pac. 395 (1919); Emerick *v.* Jones Motor Car Co., 178 Pac. (Kan.) 399 (1919); Schwartz *v.* Chatham, etc. Bank, 172 N. Y. Supp. (App. Div.) 762 (1918); Di Vona *v.* Lee, 107 Atl. (R. I.) 77 (1919). See also Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948 (1899), Scott, Cases, 469, and a collection of cases in 39 L. R. A. (N. S.) 1064.

[61] [1905] A. C. 115.

order would in most cases do substantial justice and save expense; but it was thought that the practice involved an encroachment upon the province of the jury. But it seems that there is no such encroachment; the defendant is not compelled to pay more than the jury might properly award and did in fact award. Accordingly the Supreme Court of the United States has held that this practice does not violate the constitutional guaranty of the right to trial by jury.[62] Of course, if the amount of damages found by the jury shows such bias or passion or prejudice as would presumably affect their determination of the issues as well as the question of damages, the defendant may insist upon a new trial.[63] But the mere fact that the damages are excessive does not evince such bias, passion, or prejudice.

In the recent case of *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency*,[64] the plaintiffs brought an action for libel. The court erroneously instructed the jury that a certain item of £460 might be included in the damages to be awarded. The jury assessed the plaintiffs' damages at £3,000. The plaintiffs consented to a deduction of £460. It was held by the House of Lords (Lord Atkinson and Lord Phillimore dissenting) that the defendant was not entitled to a new trial. In other words, apparently the English law requires a new trial where the excess is due to a fault of the jury, but allows a *remittitur* instead of a new trial if the excess is due to an erroneous instruction by the court.

Partial New Trials

At common law a verdict or judgment was regarded as inseverable; and if a new trial was granted, the new trial extended to all the issues, although the ground for granting the new trial may have affected only a single issue.[65] But Chief Justice Doe in the famous

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[62] Gila Valley, etc. Ry. Co. *v.* Hall, 232 U. S. 94, 34 Sup. Ct. Rep. 229 (1914), Scott, Cases, 473.

[63] Floody *v.* Great Northern Ry. Co., 102 Minn. 81, 112 N. W. 875 (1907). Similarly the awarding of inadequate damages may show an improper compromise by the jury on the issues, vitiating the whole verdict and requiring a new trial. Donnatin *v.* Union, etc. Co. 175 Pac. (Cal. App.) 26 (1918) ($1 awarded for personal injury); Simmons *v.* Fish, 210 Mass. 563, 97 N. E. 102 ($100 for loss of eye).

[64] [1919] A. C. 304.

[65] Parker *v.* Godin, 2 Str. 813 (1729), Scott, Cases, 479; Hodges *v.* Easton, 106 U. S. 408, 1 Sup. Ct. Rep. 307 (1882), Scott, Cases, 430.

case already mentioned [66] said: "The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good, and destroys only what is erroneous when the latter can be severed from the former." In several jurisdictions this principle has been adopted by statute.[67] In an increasing number of others it has been adopted without statutory authority.[68] This practice of allowing partial new trials is clearly just and expedient, saving time and expense. If the issues are not severable, if the ground for granting a new trial extends to all the issues, it is obvious that a new trial should be granted as to all the issues; and the determination of the question whether a partial or complete new trial should be granted is left to the sound discretion of the court.[69]

Prejudicial Error

In February, 1919, section 269 of the federal Judicial Code was amended by the addition of the following provision:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." [70]

Of course all courts go so far as to deny a new trial if the error *could not* have been prejudicial; and all would grant a new trial if it is affirmatively shown that the error *must* have been prejudicial. Under the prevailing rule in this country, in the absence of a statute, it is held that a new trial will be granted if the error *might* have been prejudicial.[71] In jurisdictions where a more liberal rule prevails,

[66] Lisbon *v.* Lyman, 49 N. H. 553, 583 (1870).

[67] Such a statute does not violate the constitutional provision for trial by jury. Opinion of the Justices, 207 Mass. 606, 94 N. E. 558 (1911).

[68] For recent cases see, for example, Schroeder *v.* Edwards, 205 S. W. (Mo.) 47 (1918); Davis *v.* So. Ry. Co., 175 N. C. 648, 96 S. E. 945 (1918). *Cf.* Empire Fuel Co. *v.* Lyons, 257 Fed. (C. C. A. 6) 890, 897 (1919).

[69] Gaines *v.* Baldwin, 104 Atl. (Vt.) 825 (1918). See also Norfolk So. R. R. Co. *v.* Ferebee, 238 U. S. 269, 35 Sup. Ct. Rep. 781 (1915).

[70] 40 Stat. at L. 1181.

[71] This rule is founded on the decision of the Court of Exchequer in Crease *v.* Barrett, 1 Cr., M. & R. 919, 5 Tyrw. 458 (1835), and the decision of the Court of King's Bench in Baron de Rutzen *v.* Farr, 4 Ad. & El. 53 (1835), Scott, Cases, 454, which rejected the earlier doctrine of the Court of Common Pleas laid down in Doe *v.* Tyler, 6 Bing. 561 (1830), Scott, Cases, 451.

where the court considers whether on the whole record it appears that the substantial rights of the parties have been affected by the error,[72] there is a difference as to the burden of proof; in some, as in England, the party resisting the new trial must convince the court that the alleged error was probably not prejudicial;[73] in others, as in California, the burden is on the party seeking a new trial to convince the court that the alleged error was probably prejudicial.[74] The language of the federal statute is not so clear or positive as that of the amendment recommended by the American Bar Association, but a liberal construction of it by the courts will put an end to the evil of setting aside verdicts and judgments in cases where the error does not affect the merits of the controversy.[75]

The length to which some courts are willing to go in awarding new trials is illustrated by a recent case [76] in Arkansas, where evidence of the good character of a witness was improperly admitted. This error could hardly be regarded as prejudicial, since in the absence of contrary evidence a witness is presumed to be of good character. But the court ordered a new trial. Such a decision should be impossible under any view.[77]

In the case of *King* v. *Twiss*[78] it appeared that a juryman had conversed with important witnesses, but it also appeared that what was said would have no tendency to influence him. Accordingly the court declined to grant a new trial. Similarly in *Collins* v. *Splane*,[79] where it appeared that a juror on his own initiative took a view of the premises where the personal injuries for which suit was brought had occurred, but it appeared that no prejudice probably resulted from this, it was held that no new trial need be granted.

Ordinarily if the judge erroneously instructs the jury on a vital

[72] A majority of the states have enacted statutes going at least as far as this federal statute. For a summary of these statutes, see Wheeler, "Procedural Reform in the Federal Courts," 66 U. PA. L. REV. 1, 12. To the list there given should be added MASS. STAT., 1913, c. 716, § 1.

[73] Anthony *v.* Halstead, 37 L. T. 433 (1877); White *v.* Barnes, [1914] W. N. 74, both cited in Lionel Barber & Co. *v.* Deutsche Bank (Berlin) London Agency, [1919] A. C. 304, 323.

[74] See CAL. CODE CIV. PROC. § 475.

[75] See the Third Report of the Committee to Suggest Remedies and Propose Laws relating to Procedure, 5 AMER. BAR ASS'N JOUR., 455 (1919).

[76] Lockett *v.* State, 136 Ark. 473, 207 S. W. 55 (1918).

[77] For a criticism of the decision see 17 MICH. L. REV. 406 (1919).

[78] [1918] 2 K. B. 583.

[79] 230 Mass. 281, 120 N. E. 66 (1918).

question, a new trial must follow. Ordinarily, also, if it appears that the jury has failed to follow the instructions of the judge, a new trial must follow. It may happen both that the instructions of the judge are erroneous and that the jury fails to follow them, with the result that a proper verdict is reached. In such a case it has been held in some states that a new trial is necessary.[80] The ground for this holding is that the jury were guilty of "trampling upon the authority of the court," and that to allow their verdict to stand even though it is correct on the law and on the facts, would be to give "some countenance to their assumption." [81] It is a harsh rule, however, which sacrifices a party who is entitled to his verdict on the law and facts, in order to discipline the jury. Moreover, the disciplinary effect upon the jury is practically negligible. Accordingly, in the recent case of *Public Utilities Co.* v. *Reader*,[82] it was held that under these circumstances no new trial should be granted. This view seems to accord with justice and common sense.

A somewhat similar problem arises where the judge gives correct instructions but in an improper manner. In *Fillipon* v. *Albion Vein Slate Company* [83] the jury, while deliberating, sent to the judge a written inquiry, to which the judge replied by sending a written instruction to the jury-room in the absence of the parties and their counsel and without their consent. The Supreme Court of the United States thought that the instruction was somewhat misleading, and on that account a new trial was rightly ordered. Pitney, J., in delivering the opinion of the court, said that even if the instruction was correct a new trial should be granted. The opposite result was reached in *Oates* v. *Maxcy*.[84] In the absence of prejudice to either party it would seem that the only justification for granting a new trial would be the disciplinary effect upon the judge. It seems unfair, however, to make the parties suffer in order to discipline the judge.

[80] See Penticost *v.* Massey, 81 So. (Ala.) 637 (1919).

[81] Savery *v.* Busick, 11 Iowa, 487 (1861), SCOTT, CASES, 456.

[82] 122 N. E. (Ind. App.) 26 (1919). The decision is approved in 17 MICH. L. REV. 592 (1919).

[83] 250 U. S. 76 (1919).

[84] 206 S. W. (Tex. Civ. App.) 535 (1918). If the judge had gone into the jury-room it would usually be impossible to say how far by his manner and tone of voice he might have influenced the jury; and a new trial would therefore be granted. See State *v.* Samaha, 92 N. J. L. 125, 104 Atl. 305 (1918); State *v.* Murphy, 17 N. D. 48, 115 N. W. 84 (1908), SCOTT, CASES, 385.

Declaratory Judgments

At common law an action at law lay only to redress a wrong committed before the action was brought. A court of equity might grant injunctions against threatened wrongs and might entertain bills *quia timet.* In many states statutes have given the courts power to quiet title to land, to construe wills, and to give directions to trustees. In England the courts are given much wider power to give relief in anticipation of possible future controversies. It is provided by a rule of court [85] that

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The subject of declaratory judgments has recently received considerable discussion in this country. Professor Sunderland of the University of Michigan has written an illuminating article on "A Modern Evolution in Remedial Rights, — The Declaratory Judgment;" [86] and Professor Borchard of Yale University has dealt with the same subject in an article on "The Declaratory Judgment — A Needed Procedural Reform." [87] In Michigan, as a result of Professor Sunderland's activities, the legislature has enacted a statute along the lines of the English rule,[88] and in Florida a similar statute, somewhat narrower in its provisions, has been passed.[89] In the proposed rules of civil procedure drafted by the American Judicature Society and recently published in its latest bulletin,[90] there are several proposed rules dealing with this subject, and a discussion of the problems involved.

Justice for the Poor

One of the most important of recent contributions on procedural law is a bulletin on "Justice and the Poor" by Reginald Heber Smith, Esq., of the Boston Bar, recently issued by the Carnegie

[85] Order 25, Rule 5.

[86] 16 Mich. L. Rev. 69 (1917).

[87] 28 Yale L. J. 1, 105 (1918).

[88] Mich. Stat., 1919, p.000. See 17 Mich. L. Rev. 688 (1919).

[89] Florida Laws, 1919, No. 75.

[90] Bull. XIV, 53. (1919) This matter is reprinted in the Mass. Law Quart., May, 1919, pp. 251–258.

Foundation for the Advancement of Teaching.[91] Mr. Smith has had several years of experience at the head of the Boston Legal Aid Society and has investigated the work of legal aid societies throughout the United States. The bulletin has immediately received widespread and favorable comment in the daily press. Mr. Smith shows that the traditional machinery provided for the conduct of litigation is too cumbersome to effect justice in small causes, too slow, and especially too expensive. The result is practically the closing of the doors of the courts to the poor, with the result that the unscrupulous, whether rich or poor, are enabled to prey with impunity upon them. Special agencies must be employed if justice is to be administered in small causes. Mr. Smith discusses the agencies which to some extent have been employed — small claims courts, conciliation, arbitration, domestic relations courts, administrative tribunals, administrative officials, assigned counsel, public defenders, and legal aid organizations. There is no branch of the law of procedure which more urgently requires the attention of all who have at heart the administration of justice and the well-being of the nation.

Austin W. Scott.

HARVARD LAW SCHOOL.

[91] BULL. XIII (1919).